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NOS. 00-1770 AND 00-1781

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

V.

PEARLIE RUCKER, ET AL.

OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS

V.

PEARLIE RUCKER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* PENNSYLVANIA ASSOCIATION OF RESIDENT COUNCILS, RESIDENT ADVISORY BOARD TO THE ALLEGHENY COUNTY HOUSING AUTHORITY, ERIE TENANTS COUNCIL, AND HAZELTON ALLIANCE OF RESIDENT COUNCILS, IN SUPPORT OF RESPONDENTS PEARLIE RUCKER, ET AL.

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Statement of Interest of *Amici Curiae*[1]

Amici curiae are a statewide association of public housing resident councils, one local association of resident councils, one local resident council, and one local resident advisory board. Each represents the interest of persons who are subject to so-called One-Strike[2] eviction policies in their respective communities. By application of these policies over the last six years, public housing agencies in Pennsylvania have attempted to strip low-income persons of essential housing benefits without regard to whether the affected persons were themselves culpable of any crime. See, e.g., *Allegheny County Housing Authority v. Hibbler*, 748 A.2d 786 (Pa.Cmwlth. 2000), *allocatur denied*, 759 A.2d 924 (Pa. 2000). Each of the *Amici* respectfully submits that this Court should maintain and enforce clear and long-standing Congressional policies that protect innocent law-abiding tenants from arbitrary termination of their housing assistance.

The Pennsylvania Association of Resident Councils provides statewide technical support and training to 350 local resident councils. These local resident councils in turn represent the interests of approximately 80,000 public housing tenants in Pennsylvania. The Hazelton Alliance of Resident Councils is a local umbrella organization of resident councils representing federally-assisted housing developments in the Hazelton area. The Erie Tenants Council is a nonprofit advocacy group which represents the political, social, and economic rights of approximately 1,800 families residing in public housing in the city of Erie, PA. The Resident Advisory

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[1] *Amici Curiae* have obtained the written consent of Petitioners United States Department of Urban Development (HUD), Oakland Housing Authority (OHA), and Harold Davis, as well as the written consent of Respondents Pearlie Rucker, et al. to file this brief with the Court. Pursuant to Supreme Court Rule 37(6), *Amici Curiae* note that counsel for *Amici* wrote the entirety of this brief and that no person or entity, other than the *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] See, HUD Notice PIH 96-16, "One Strike and You're Out of Public Housing" (April 12, 1996), at 6.

Board to the Allegheny County Housing Authority has been established pursuant to federal law to "adequately reflect and represent the residents" assisted by the Allegheny County Housing Authority (ACHA), in order to "assist and make recommendations [to ACHA] regarding the development of [ACHA's] public housing agency plan . . . ." See, generally, 42 U.S.C. § 1437c-1(e). Among the various policies included in ACHA's agency plan are occupancy and termination standards for the 2,490 families currently receiving assistance from ACHA.

Summary of Argument

Barely six months ago, this Court held that agency interpretations purporting to resolve statutory ambiguity may avail themselves of one of two deference standards, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Agency interpretations seeking *Chevron* deference must satisfy two showings: First, that Congress delegated authority to the agency to make law, and second, that the interpretation at issue is the product of the agency's law-making authority. *U.S. v. Mead Corp.*, 121 S.Ct. 2164, 2171 (2001).

Petitioner HUD has promulgated several regulations in implementation of 42 U.S.C. § 1437d(*l*)(6), but none that squarely address two questions: (1) whether, in enacting § 1437d(*l*)(6), Congress intended to foreclose judicial review of adverse PHA decisionmaking, and (2) whether Congress intended to abrogate a tenant's state-law affirmative and equitable defenses. Instead of resolving these matters through notice and comment rulemaking, HUD has reverted to announcing its interpretations on an ad hoc basis (at oral argument before the Court of Appeals) and by means other than formal codification (in preambles to two final rules).

Such announcements by HUD are no substitute for formal notice and comment rulemaking, and in fact pervert that process. Such announcements, moreover, are not entitled to *Chevron*

deference, because they do not represent an actual exercise of Congressionally-delegated authority.

This Court and Congress both recognize that proper notice to affected parties is an essential requirement of the law. Were an agency permitted to circumvent the rigors of the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq*, the goal of effective notice would be frustrated. Furthermore, enforcement of improperly promulgated legal standards raises the specter of arbitrary enforcement of the law, a concept wholly offensive to our nation's values. Not only has HUD failed to formally codify its positions regarding the above issues, but it has also failed to adopt an unequivocal position regarding several related concerns.

In 1991, HUD published its first final rule interpreting §1437d(*l*)(6). 56 Fed. Reg. 51560 (October 11, 1991). None of the regulations published within that rule directly answered either of the two matters identified above. Although HUD raised, in the preamble, the issue of contractual responsibility for crimes that the tenant had no knowledge of, it never resolved that issue with regard to judicial review or tenant defenses. Further along in the preamble HUD discussed the PHA's power to forbear, based on its weighing of mitigating circumstances, but again did not address whether and to what extent such power might affect the issues of judicial review and tenant defenses. Significantly, in the same publication HUD asserted that no part of the rule preempted state law, and recognized as well the role that eviction courts play in crime-based terminations of housing assistance.

Approximately eight years after the 1991 article, HUD announced its only unequivocal interpretation regarding judicial review, *viz.*, that eviction courts could not, consistent with § 1437d(*l*)(6), review a PHA's decision for abuse of discretion. The announcement came at oral argument before the Court of Appeals, at which time HUD also suggested that Congress had abrogated the tenant's state law defenses. See, 237 F.3d 1113, 1123, n. 3 (9th Cir. 2001)(Opinion below). Then, in May of this year, HUD issued a second set of regulations construing § 1437d(*l*)(6). 66 Fed. Reg. 28776 (May 24, 2001). In the preamble to that final rule, HUD

reiterated that eviction courts did not have the power to weigh mitigating circumstances, and that such power was only properly exercised by PHAs. But as was the case with the 1991 rule, the 2001 rule did not codify HUD's positions regarding judicial review and tenant defenses, and furthermore denied that HUD's interpretations had preempted state law.

With the exception of whether a reviewing court may substitute its judgment for the discretion, or lack thereof, exercised by a PHA, HUD's interpretations have failed to resolve any ambiguity under the statute. Although HUD asserted before the Court of Appeals that § 1437d(*l*)(6) precluded eviction courts from reviewing a PHA's decision to sue, it merely implied that the same provision precluded the consideration of affirmative defenses. Moreover, in its preambular discussions HUD staked out only one unequivocal position, that courts may not weigh mitigating circumstances in evaluating the propriety of a PHA's decision to sue. And HUD has never codified in formal regulations, pursuant to notice and comment, its views regarding any of these issues. As a result, HUD has failed to exercise the Congressionally delegated authority to make law. *See, Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994)(resolution of statutory ambiguities is the "very purpose behind the delegation of lawmaking power to administrative agencies.")(Thomas, J., dissenting)(citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)). Consequently, HUD's interpretations are not entitled to *Chevron* deference.

Because this Court has previously refused to defer to agency positions advanced by appellate counsel, rather than by the agency itself, HUD's unequivocal assertion before the Court of Appeals does not alter this analysis. *See, Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988)(citing, *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971)); see also, *Mead*, 121 S.Ct. at 2177, n.19 (declining to extend *Chevron* deference to agency's brief). Furthermore, there is no reason to believe that Congress delegated authority to HUD to announce the abrogation of state law defenses and judicial review. The text of § 1437d(*l*)(6) is absolutely silent and HUD has admitted that its interpretations have

no preemptive effect. Finally, as a matter of policy this Court should not reward HUD for failing to legislate by appropriate means its interpretations regarding judicial review and tenant defenses. HUD clearly had reason to know the significance of these matters, as they had been determinative in several reported decisions prior to HUD's most recent 2001 rule. *See, e.g., Charlotte Housing Authority v. Patterson*, 120 N.C.App. 552, 557-58, 464 S.E. 2d 68 (N.C. App. 1995)(United States Housing Act prohibits imposition of strict liability; eviction of innocent tenants would "shock court's sense of fairness"); *Allegheny County Housing Authority v. Hibbler*, 748 A.2d 786 (Pa.Cmwlth. 2000), *allocatur denied*, 759 A.2d 924 (Pa. 2000)(PHAs must consider mitigating factors in public housing drug evictions; trial court properly credited tenant's claims of innocence in defense to eviction action). *See, generally, Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 110 (1995)(O'Connor, J., dissenting)(where ambiguity foreseeable, agency should not be permitted to circumvent notice and comment procedures by resolving ambiguity in less formal interpretive guide).

Furthermore, because according *Chevron* deference to HUD's interpretations would frustrate the interests which that doctrine is intended to advance, deference is not appropriate in this case. Broadly speaking, in according deference to legislative rulemaking by agencies, *Chevron* serves three purposes (1) vesting policy making in federal agencies accountable to the President 467 U.S. at 864-865, (2) vesting policy making in agencies whose expertise exceeds that of the judiciary 467 U.S. at 865, and (3) promoting uniformity of results. *See, Mead*, 121 S.Ct. at 2175 (declining to extend *Chevron* deference)("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting"). Deference in these circumstances would fail to serve the first purpose, because HUD's rulemaking does not purport to represent a policy choice by HUD, and further, because the ultimate decisionmaker in disputes arising under § 1437d(*l*)(6) is a local state-commissioned PHA, and not a federal agency accountable to the President. Furthermore, no agency expertise is required to answer the

question of whether indigent persons have a right, under §1437d(*l*)(6), to judicial review of PHA decisionmaking, or to defend against the PHA's lawsuit for possession. Finally, by proposing that the various local PHAs should decide, on a case-by-case basis, whether and to what extent to permit tenants to assert the defense of innocence and other mitigating circumstances, HUD necessarily promotes a non-uniform regime.

The final inquiry for deference purposes is set forth in *Skidmore*, and requires a weighing of five factors: (1) the thoroughness of the agency's consideration, (2) the validity of the agency's reasoning; (3) the degree of agency expertise evident in the interpretation; (4) the consistency of the interpretation in light of the agency's earlier and later pronouncements; and (5) all other factors bearing on the persuasiveness of the interpretation. *Mead*, 121 S.Ct. at 2172 (quoting *Skidmore*, *supra*); 121 S.Ct. at 2175 (interpretation has colorable claim to *Skidmore* deference where regulatory scheme highly detailed and agency can bring specialized experience to bear).

HUD's interpretations fail in all five respects. First, HUD's assertion that Congress abrogated the right to any judicial review of PHA decisionmaking, as well as the tenant's affirmative and equitable defenses, arose in an adversarial proceeding before the Court of Appeals. Such reasoning cannot constitute an agency's "fair and considered" judgment. Second, HUD's interpretations reveal several significant lapses in the agency's reasoning, including (1) that its interpretations barring state courts from weighing mitigating circumstances does not constitute a preemption of state law; (2) that partial eviction remedies are consistent with the general deterrent purpose of § 1437d(*l*)(6); (3) that tenants will be encouraged to disclose the commission of crime by family members even though such disclosure subjects the reporting tenant to eviction; (4) that mitigating circumstances are relevant, even though HUD's interpretation would permit the rejection of mitigating circumstances in every case. Third, and as previously mentioned, no agency expertise is necessary for answering the question of whether tenants should have a meaningful right to judicial review of adverse agency action, or the right to raise affirmative and equitable defenses to an

eviction action. Fourth, HUD's interpretations at the Court of Appeals conflict with its assertion of no preemptive effect in the 1991 and 2001 final rules. Fifth, HUD's interpretations are unpersuasive because they encourage arbitrary terminations of housing assistance, in contravention of the decades-long recognition of Congress and the courts that essential housing benefits should not be terminated in the absence of evidence that the tenant herself is guilty of serious misconduct.

Because HUD's interpretations are entitled to no deference, the construction of § 1437d(*l*)(6) urged by the respondents should control. According to that construction, Congress has clearly prohibited the termination of public housing assistance for criminal activity that the tenant neither knew of nor had reason to know. Consequently, Congress did not intend to abrogate the tenant's affirmative and equitable defenses, nor the tenant's right to judicial review of adverse PHA decisionmaking, as these are plainly necessary to protect the tenant from an erroneous and unwarranted decision to terminate assistance.

Argument

I. Introduction

Barely six months ago, this Court clarified the standards which govern disputes over agency interpretations of law. In *U.S. v. Mead Corp.*, 121 S.Ct. 2164, 2171 (2001), the Court held that agency interpretations purporting to resolve statutory ambiguity may avail themselves of one of two deference standards, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). To merit deference under *Chevron*, however, the agency interpretation must satisfy two prerequisites: First, a showing that Congress has delegated authority to the agency to issue interpretations with the force of law, and second, a showing that the interpretation is the product of the agency's deliberate exercise of such authority. *Mead*, 121 S.Ct. at 2171 (2001).

Today, HUD petitions this Court to disavow the clarification only recently articulated in *Mead*. At issue are two HUD interpretations regarding the statutory standard for termination of a public housing tenancy. The interpretations, that tenants have no right to judicial review of adverse agency decisionmaking, and may not raise an affirmative or equitable defense to a lease termination action predicated on crime, have never been formally codified. Instead, these interpretations have only arisen intermittently, in preambular language to HUD's final rules, and in argument before the Court of Appeals. Clearly, these interpretations do not represent an actual exercise of law-making authority. Yet HUD asks the Court to bestow *Chevron* deference upon them. As explained below, there is no proper or compelling basis for doing so. In addition, because extending *Chevron* deference to these interpretations would not serve the interests upon which the *Chevron* doctrine is founded, such deference would be inappropriate. Finally, because the interpretations do not pass muster under the less deferential standard of *Skidmore*, they are entitled to no deference at all.

Amici hereby adopt by reference the arguments advanced by respondents, which demonstrate that Congress clearly prohibits the

termination of a public housing tenancy on the basis of criminal activity that the tenant neither knew of nor had reason to know. However, in this brief, *Amici* will present an argument in the alternative: assuming that Congress' intent is less than clear, the HUD interpretations before the Court are entitled to no deference. As a result, resolution of the questions presented will require an inquiry into the overall purposes of the United States Housing Act, 42 U.S.C. §§ 1437 *et seq.*, as ably recited in the briefs of the respondents and various *amici* in support thereof. *Amici* submit that such an approach leads inevitably to the conclusion that need-based benefits such as public housing assistance may not be terminated for crimes which the recipients neither knew of nor could have foreseen.[3] The judgment of the Court of Appeals should therefore be affirmed.

II. Congress did not intend to abrogate the right to judicial review of adverse PHA decisionmaking, nor the right to raise affirmative and equitable defenses under state law.

A. HUD's non-codified interpretations asserting that public housing tenants have no right to judicial review of adverse PHA decisionmaking, and no right to raise affirmative or equitable defenses in an eviction lawsuit brought on the basis of criminal activity, are entitled to no deference.

Notice to affected parties, through formal rulemaking or adjudicatory procedures, is recognized as an essential component of administrative law. Both the Administrative Procedure Act (APA)

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[3] *Amici* hereby adopt by reference the arguments advanced in the Respondents' brief, as well as the arguments advanced in the briefs filed on behalf of *Amicus Curiae* American Civil Liberties Union of Northern California, and *Amici Curiae* AARP, et al.

5 U.S.C. §§ 500 *et seq.* and the *Chevron* canon contemplate that resolution of statutory ambiguities should generally be achieved through formal procedures such as notice and comment rulemaking or adjudication. *Mead*, 121 S.Ct. at 2173 ("overwhelming" number of instances applying *Chevron* deference to interpretations promulgated pursuant to formal rulemaking or adjudication); H.R.Rep. No. 1980, 79th Cong., 2d Sess. 23 (1946)(purpose of APA is "To provide that the legislative functions of administrative agencies shall so far as possible be exercised only upon public participation on notice."); S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945)("notice must be sufficient to fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto."). Were an agency permitted to bypass these formal procedures, the goals of the APA, as well as the rationales underlying *Chevron*, would plainly be frustrated. *See, Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 110 (1995)(O'Connor, J., dissenting)(where ambiguity foreseeable, agency should not be permitted to circumvent notice and comment procedures by resolving ambiguity in less formal interpretive guide).[4] Thus, this Court recently refused to apply *Chevron* deference to an agency's non-formal interpretation premised upon statutory ambiguity. *Mead*, 121 S.Ct. at 2171 (non-formal interpretative rule

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[4]In her dissent in *Guernsey*, Justice O'Connor identified the potential for abuse where deference is accorded an agency's informal interpretation which, the agency asserts, resolves an ambiguity in its own regulations:

> I find it significant that the bond defeasement situation at issue here *was* foreseen. If the secretary had the opportunity to include a section on advanced refunding costs in the [manual], then she could have promulgated a regulation to that effect in compliance with the Administrative Procedure Act, thereby giving the public a valuable opportunity to comment on the regulation's wisdom and those adversely affected the chance to challenge the ultimate rule in court. An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through substantive changes recorded in an informal policy manual that are unsupported by the language of the regulation.

(Emphasis in original). 514 U.S. at 110-111.

only entitled to *Skidmore* deference).[5]

The Court's concern with proper and effective notice of agency rulemaking reflects a larger interest in preventing arbitrary enforcement of the law. See, *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994)(Thomas, J., dissenting)("an agency whose powers are not limited either by meaningful statutory standards or . . . legislative rules poses a serious potential threat to liberty and to democracy.")(quoting, K. Davis & R. Pierce, Administrative Law § 11.5, p. 204 (3d ed. 1994)). The evils inherent in such practices have long been apparent to this Court. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)("A vague law impermissibly delegates policy matters . . . for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.")(footnotes omitted); *Cole v. Young*, 351 U.S. 536, 556 (1956)(ambiguities in Executive Order construed against government where termination of employment premised on national security).

In its argument before the Court of Appeals, Petitioner HUD announced two interpretations of 42 U.S.C. §1437d(*l*)(6) which HUD has never codified, much less enunciated in unequivocal terms in any preamble to a proposed or final rule. Assuming *arguendo* that HUD's

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[5]In *Mead*, the Court observed that it had previously applied *Chevron* deference to an agency's interpretation promulgated beyond the bounds of formal rulemaking or adjudication. *Mead*, 121 S.Ct. at 2173, n. 13 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995). *NationsBank* is easily distinguished from this case. In *NationsBank*, the Court explained that deference was warranted because Congress had delegated enforcement powers to the agency (to superintend the business of banking) in order to effectuate the goals of a regulatory statute (National Bank Act, Rev.Stat. §§ 5136, as amended, 12 U.S.C. § 24 Seventh (1988 ed. and Supp. V)). *Id.* ("It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.")(citing, *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 403-04 (1987)). Because this dispute does not present issues of regulatory enforcement, *NationsBank* is inapplicable.

interpretations are predicated upon actual statutory ambiguity, *Amici* submit that they are not entitled to *Chevron* deference, because they do not represent an actual exercise of Congressionally delegated authority. *Mead, supra.* Further, *Chevron* deference is not appropriate where, as here, such deference would undermine the three interests which the doctrine is intended to advance. Finally, and notwithstanding their colorable claim to *Skidmore* deference, the interpretations have no power to persuade, and thus are not entitled to any deference.

1. Since 1991, HUD's interpretations regarding judicial review and tenant defenses have been informal and largely equivocal.

Congress first enacted the tenancy termination standard appearing at 42 U.S.C. § 1437d(*l*)(6) in 1988.[6] That standard, which creates a cause of action for termination of tenancy, has remained essentially unchanged in the ensuing thirteen years. In its current form, the standard requires PHAs to use leases which:

> provide that any . . . drug-related criminal activity on or off [public housing] premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, *shall be cause for termination of tenancy*.

As HUD concedes, Congress has never intended that this provision be read to *require* eviction.[7] On the contrary, by employing the phrase *cause for termination of tenancy*, Congress has simply

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[6]This provision was originally codified at 42 U.S.C. §1437d(*l*)(5), and renumbered in 1998 as subsection (*l*)(6). See, Historical and Statutory Notes, 42 U.S.C. §1437d (1994 & Supp. V 2000).

[7]HUD Brief at 21 ("HUD has consistently made clear that '[t]he fact that statutorily required lease provisions would allow PHAs to terminate tenancy under certain circumstances does not mean that PHAs are required to do so in each case where the lease would allow it.").

defined a cause of action. Whether a PHA might ultimately sue on that cause of action, or what defenses a tenant might raise in opposition, are by definition beyond the scope of this provision.

In 1991, HUD published a final rule which announced four separate interpretations of § 1437d(*l*)(6). Three appeared as formal regulations, while the fourth was included in the preamble to the final rule. Of the three regulations, one essentially parroted the language of the statute (24 C.F.R. § 966.4(l)(2), 56 Fed. Reg. 51560, 51578 (1991)), one obligated the tenant to assure that neither the tenant, household member, guest, or other person under the tenant's control would commit drug-related criminal activity (24 C.F.R. § 966.4(f)(12), 56 Fed. Reg. at 51577), and one authorized PHAs to consider mitigating circumstances when deciding whether to sue or forbear (24 C.F.R. § 966.4(l)(5), 56 Fed. Reg. at 51578).

HUD's fourth interpretation, in contrast, responded to commentary addressing, *inter alia*, the proposed assurance requirement (§ 966.4(f)(12)), as well as the possible imposition of liability for criminal acts that the tenant did not know of or have reason to foresee, or in which the tenant did not participate or acquiesce, or which were committed by persons beyond the tenant's control, or which occurred despite the tenant's preventive efforts. In response to those comments, HUD stated:

> There is no reason of Constitutional necessity or public policy for HUD to impose—as proposed by comment—any additional restriction on when the tenancy *may be terminated* for criminal activity by a household member. . .
>
> The tenant *should not* be excused from contractual responsibility by arguing that tenant [sic] did not know, could not foresee, or could not control behavior by other occupants of the unit.

56 Fed. Reg. at 51567. (Emphasis added). At the outset, it is noteworthy that in this excerpt HUD recognized that, to the extent the fourth interpretation represented a policy choice, the choice was

Congress' alone. ("The legislative determination by the Congress rests on a reasonable judgment that the potential for a PHA to exercise eviction as a contractual sanction against criminal behavior by unit occupants will promote the welfare of public housing residents in general . . ." *Id.*). Further, because HUD's interpretation employed precatory language, it clearly recognized the ambiguities which the statute left unresolved, including the appropriateness or desirability of eviction in any particular set of circumstances.

That said, the excerpt raised at least as many questions as it answered. For example, despite the lack of any explicit language in the statute abrogating state-created affirmative and equitable defenses,[8] the excerpt suggested that Congress had done precisely that. Such an assertion, however, would plainly conflict with HUD's assertion at the end of the preamble that none of its interpretations preempted state law.[9] Finally, the excerpt did not expressly limit the

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[8] Pennsylvania law recognizes the equitable doctrine of anti-forfeiture, as well as affirmative defenses to lease termination. *See*, *Cimina v. Bronich*, 503 A.2d 427, 429 (Pa. Super. 1985)(courts will not impose forfeiture in absence of showing that breach was material; tenant's innocence is one of five factors used to determine materiality of breach), *rev'd on other grounds*, 537 A.2d 1355 (Pa. 1988); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979)(breach of implied warranty of habitability as defense to termination for rental default). Since its inception, the United States Housing Act of 1937 has explicitly recognized and preserved "the civil rights under the State or local law of the inhabitants on such property." Pub. L. No. 75-412, § 13(b), 50 Stat. 888, 895, 42 U.S.C. §§ 1437 *et seq*. HUD, moreover, has long recognized that public housing tenancies are defined by state law. *See*, Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. 33,216, 33,257 (Aug. 30, 1988)("[T]he procedural and substantive law affecting a tenancy in the public housing program is compounded of elements established by both Federal and State law.").

[9] *See*, 56 Fed. Reg. at 51,575 ("The General Counsel, as the Designated Official under Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal Government and the States. . ."); *see also* Exec. Order No. 12,612, 52 Fed. Reg. 41685, § 4(a) (October 26, 1987) ("Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the

scope of review of the eviction court,[10] particularly regarding whether a court might review adverse PHA decisionmaking for abuse of discretion.

Two subsections later, HUD turned to the issue of PHA discretion, and specifically, the final regulation which recognized the authority of PHAs to forbear on the basis of mitigating circumstances. In introducing this regulation, HUD noted, "[T]he decision when and whether to evict is a discretionary management judgment by the individual PHA. The decision is and should be made by the PHA. . ." 56 Fed. Reg. at 51567. Having said that, HUD never hinted at the reality that would confront a tenant who wished to place mitigating evidence before the agency, given that the regulations provided no procedures for doing so.[11]

Finally, several sections later in the article, HUD recognized the role of the eviction court, ". . .[T]he tenant must have a right, pursuant to [the] law of the jurisdiction, to a decision based on the evidence and the law. . ." *Id.* at 51574. But just as was the case earlier in the article, HUD did not mention the power of a court to hear a tenant's challenges to adverse PHA decisionmaking.

Eventually, HUD would speak directly to these issues, albeit

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exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute."), *revoked by* Exec. Order No. 13,083, 63 Fed. Reg. 27,615 (May 14, 1998).

[10] HUD's respect for the distinction between the concepts of *eviction* and *termination of tenancy* appears to vary depending upon the context. For example, when addressing the issue of court adjudication, HUD nominally acknowledges that PHAs do not have unilateral power to evict. *See*, 56 Fed. Reg. at 51578 ("The PHA may evict the tenant from the unit only by bringing a court action."), 24 C.F.R. § 966.4(l)(4)), *and*, 56 Fed. Reg. 51568 ("By law, a PHA may terminate a public housing lease for 'other good cause' . . ."). Elsewhere in the preamble, however, when discussing PHA decisionmaking, HUD removes the eviction court from the equation. *See*, 56 Fed. Reg at 51567 (". . . [T]he decision when and whether to evict is a discretionary management judgment by the individual PHA. The decision is and should be made by the PHA. . ."); *Id.* (". . .[A] decision to evict for criminal activity is not automatic but rests in the discretion of the PHA . . .").

[11] Noticeably absent in HUD's brief is any mention of this fact.

eight years later, and apparently only after having been pressed on the matter. According to the Court of Appeals, at oral argument, "HUD took the position . . . that an eviction court could only consider whether or not the lease term was violated, and could not review the PHAs' [sic] decision that the violation warranted eviction."[12] 237 F.3d 1113, 1123, n. 3 (9th Cir. 2001)(Opinion below). Thus, almost a decade after the 1991 regulations, HUD announced that in enacting § 1437d(*l*)(6) in 1988, Congress had intended to preclude courts from reviewing a PHA's decision to sue, rather than excuse, a tenant. At the same time, HUD suggested that the notion merely hinted at in the 1991 preamble was now the law: that Congress had abrogated state law defenses to the PHA's cause of action in the event of drug-related crime. In other words, *only* the PHA, and not an eviction court, had the power to credit a tenant's defenses; further, *only* the PHA had the authority to consider mitigating circumstances; and finally, and most importantly for this discussion, *no* court could entertain, much less evaluate, a claim that the PHA had committed an abuse of discretion in deciding to sue.

In May of this year, HUD issued its most recent final rule construing § 1437d(*l*)(6). In the preamble, HUD responded to a comment urging that the final rule should encourage courts to "consider all circumstances" and "exercise discretion in a humane manner" when evicting a tenant for another person's criminal activity. HUD began its response by noting that elsewhere in the preamble it had recognized a PHA's flexibility (i.e., discretion) to consider mitigating circumstances. HUD then stated:

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[12]Even this assertion begs the question. In Pennsylvania, eviction lawsuits and appeals from adverse agency decisions are docketed separately, and there is no guarantee that one court will hear both. *See*, 68 P.S. § 250.502(a)(suit to recover possession initiated in justice of the peace court) and 42 Pa.C.S.A. § 932 (Court of Common Pleas' jurisdiction over appeals from minor judiciary) and 42 Pa.C.S.A. § 933(a)(2)(Court of Common Pleas' jurisdiction over appeals from local agencies). Thus, the assertion that an eviction court may not review an adverse agency decision does not answer the question of whether another court could.

> The statute does not authorize courts to exercise this same type of discretion. Courts determine whether a violation of the lease has occurred and whether the lease provides that such a violation is grounds for eviction of the persons whom the PHA seeks to evict.

66 Fed. Reg. at 28782 (May 24, 2001).[13]

As in the 1991 excerpt discussing the grounds for termination of tenancy, HUD once again attributes the policy choices embodied in the excerpt to Congress, rather than to itself. As for resolving any ambiguity in the statute, however, this excerpt actually perpetuates several. Regarding discretion, HUD asserts that courts lack the authority to weigh the mitigating circumstances relevant to the PHA's decision to sue or forbear. As in the 1991 preamble, however, this claim has no explicit support in the statute's text, and furthermore conflicts with the preamble's assertion that the interpretations within did not preempt state law. 66 Fed. Reg. 28776, 28791 (May 24, 2001)("This final rule does not . . . preempt State law within the meaning of Executive Order 13132."). Moreover, while the excerpt purports to prohibit a court from weighing mitigating circumstances (and substituting its decision for that of the agency), it does not appear to preclude a court from vacating a PHA's decision for failure to consider one or more mitigating circumstances. See, *Motor Vehicles Mfgrs. Assoc. v. State Farm*, 463 U.S. 29, 44 (1983)(agency's failure to consider important issue normally constitutes abuse of discretion). Furthermore, and in stark contrast to the position which HUD advanced before the Court of Appeals, the

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[13]In all, the 2001 preamble contains three references to the limitation on the right of judicial review. *See, also*, 66 Fed.Reg. at 28782 (". . . [A] court's function under HUD's regulations is to determine whether an eviction meets the requirements of the lease and of Section 6(l)(6) as they have been interpreted in that jurisdiction, and not whether a PHA has considered additional social and situational factors that HUD's regulations authorize, but do not require a PHA to consider."); 66 Fed.Reg. at 28783 (". . .HUD's conferral of discretion on PHAs in deciding whether to terminate tenancy in each case does not constitute a conferral of discretion on local courts to consider factors other than those appropriate under the lease.")

excerpt fails to explicitly address whether a court may credit the tenant's affirmative and equitable defenses for breach of contract. In *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), this Court held that a regulation providing for negotiated compensatory time agreements did not preclude an employer from forcing its employees to retire compensatory time through the employer's mandated schedule. By that reasoning, HUD's assertion disavowing judicial review of PHA decisionmaking cannot be seen as affirmatively precluding an eviction court from considering affirmative and equitable defenses. As of the date of this filing, HUD has yet to publish a regulation asserting that courts may not review adverse PHA decisionmaking, nor credit the tenant's affirmative and equitable defenses. Yet HUD invokes *Chevron* to legitimize the interpretations which thus far have appeared only in regulatory preamble and appellate advocacy. For the reasons stated in the next section, the interpretations which HUD has announced in purported resolution of these issues are due no deference.

2. To the extent that HUD's interpretations would prohibit an eviction court from hearing an abuse of discretion challenge to PHA decisionmaking, or from considering a tenant's affirmative and equitable defenses, they are entitled to no deference under *Chevron* or *Skidmore*.

Six months ago, this Court clarified the standards of review which govern agency rulemaking predicated upon statutory ambiguity. As stated in *Mead, supra*, such interpretations may merit deference under one of two standards, *Chevron* and *Skidmore*. For deference under *Chevron*, two showings are required: First, that Congress has delegated law-making authority to the agency, and second, that the agency's interpretation is the product of such delegated law-making authority. 121 S.Ct. at 2177. Should the interpretation fail those showings, the agency may yet seek deference under *Skidmore* (*Mead* at 2171 & 2177), in which case the agency has the burden of establishing that the interpretation is persuasive.

Christensen, 529 U.S. at 587 (2000)(rejecting interpretation advanced by agency as unpersuasive).

HUD's interpretations of § 1437d(*l*)(6) are not the product of HUD's law-making authority, and thus are not entitled to deference under *Chevron*. Alternatively, *Chevron* deference is not appropriate where, as here, such deference would undermine the three interests that the doctrine is intended to serve. Finally, because HUD's interpretations are unpersuasive, they are entitled to no deference under the less deferential standard of *Skidmore*.

a.) To the extent that HUD's interpretations would prohibit an eviction court from hearing an abuse of discretion challenge to PHA decisionmaking, or from considering a tenant's affirmative and equitable defenses, they do not constitute an exercise of Congressionally-delegated authority, and thus do not merit *Chevron* deference.

As identified in the preceding section of this brief, HUD's interpretations have, with one exception, failed to resolve any ambiguity under the statute. Although HUD asserted before the Court of Appeals that § 1437d(*l*)(6) precluded eviction courts from reviewing a PHA's decision to sue, it merely implied that the same provision precluded the consideration of affirmative defenses. Moreover, in its preambular discussions HUD staked out only one unequivocal position, *viz.*, that courts may not weigh mitigating circumstances in evaluating the propriety of a PHA's decision to sue.[14] As to each of the other issues discussed in the preceding section of this brief, however, HUD has never published, adopted, or even articulated a clear policy. And HUD has never codified in formal regulations, pursuant to notice and comment, its views regarding any of these issues. As a result, HUD has failed to exercise

[14]As previously mentioned, HUD did not use the occasion to clarify whether it believed that the statute precluded a court from vacating a PHA's decision because of a failure to consider, as opposed to properly weigh, mitigating circumstances.

the Congressionally delegated authority to make law. *Cf., Thomas Jefferson University*, 512 U.S. at 525 (1994)(resolution of statutory ambiguities is the "very purpose behind the delegation of lawmaking power to administrative agencies.")(Thomas, J., dissenting)(citing *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)); *Guernsey*, 514 U.S. at 109-110 (". . . [The] Secretary advances a view of the regulations that would force us to conclude that she has not fulfilled her statutory duty to promulgate regulations determining the methods by which reasonable Medicare costs are to be allocated.")(O'Connor, J., dissenting).

HUD's unequivocal assertion before the Court of Appeals does not alter this analysis. This Court has previously refused to defer to agency positions advanced by appellate counsel, rather than by the agency itself. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988)(citing, *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971)).[15] Moreover, the Court has noted the

[15]In *Auer v. Robbins*, 519 U.S. 452 (1997), this Court gave controlling weight to an administrative interpretation appearing in the brief filed by the agency as *amicus curiae*. *Auer* has no application to this case, for at least three reasons. First, the delegated power at issue in *Auer* was quite specific: to define and delimit the scope of the exemption for executive, administrative, and professional employees. 519 U.S. at 457. Thus, the Court observed that "[a] rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute." *Id.* at 463. In contrast, Congress has never delegated to HUD the specific power to abrogate state law defenses or judicial review, a fact which HUD implicitly concedes, given its assertion that none of its interpretations have preempted state law. Note 8, *supra*; Argument § II.A.1, *supra*. Accordingly, HUD has no power under the statute to modify or limit the tenant's rights and defenses under state law. *Accord, U.S. v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982)(less deference owed to regulation promulgated pursuant to general grant to "prescribe all needful rules and regulations," than to regulation issued under a specific grant of authority). Second, the interpretation at issue in *Auer* resolved an ambiguity which arose directly from the regulation, and was likely unforeseeable to the agency at the time that the regulation was promulgated, *viz.*, whether the regulation-defined exemption (discipline-based pay reductions) for coverage under the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, *as amended*, 29 U.S.C. §§ 201 *et seq.*, required a showing of actual likelihood of such a penalty, as opposed to a nominal possibility. In this case HUD has never published a regulation which directly

inappropriateness of according *Chevron* deference to an agency's interpretation arising for the first time in an adversarial brief. *Mead*, 121 S.Ct. at 2177, n.19 (declining to extend *Chevron* deference to agency's brief). Here, HUD can provide no good excuse for its failure to promulgate regulations, prior to this litigation, which would have resolved the ambiguities just discussed. *See, Thomas Jefferson University, supra* (agency's failure to issue clear regulation deprives adequate notice to affected persons)(Thomas, J., dissenting).

Furthermore, there is no reason to believe that Congress delegated authority to HUD to announce the abrogation of state law defenses and judicial review. On the contrary, the text of §1437d(*l*)(6) is absolutely silent in this regard—a silence that is all the more remarkable in light of Congress' practice, in other settings, of explicitly expressing its intentions to limit defenses to causes of

addresses two issues which *have* been within HUD's sights for many years, judicial review of adverse PHA decisionmaking, and the tenant's affirmative and equitable defenses. *See, Charlotte Housing Authority v. Patterson*, 120 N.C.App. 552, 557-58, 464 S.E. 2d 68 (N.C. App. 1995); *Allegheny County Housing Authority v. Hibbler*, 748 A.2d 786 (Pa.Cmwlth. 2000), *allocatur denied*, 759 A.2d 924 (Pa. 2000) *supra*. Given the absence of regulatory text explicitly addressing these issues, HUD cannot establish the premise underlying the Court's holding in *Auer*, namely, an ambiguity directly related to the actual terms of the regulation. Further, because these issues were foreseeable to HUD prior to the publication of its 2001 final rule, the failure to resolve them by regulation is inexcusable. *See, Guernsey*, 514 U.S. at 110 (O'Connor, J., dissenting). Third, the interpretation in *Auer* was advanced in an *amicus* brief, and as such could rightfully claim that it represented the agency's thorough and careful consideration. That situation is a far cry from HUD's colloquy with the Court of Appeals.

action,[16] or to curtail judicial review.[17] Moreover, HUD has admitted that its interpretations have no preemptive effect (*See*, n. 8, *supra*; Argument at II.A.1, *supra*), and thus implicitly concedes that Congress did not intend to supplant the tenant's state law protections against adverse PHA action.

HUD cannot claim that its interpretations are intended to resolve an ambiguity that arises from the regulations. Indeed, nowhere in its brief does HUD explain where such ambiguity might be found. On the contrary, because HUD attributes the policy choices embodied in its interpretations to Congress[18], and because HUD asserts that these policy choices are readily apparent[19], it necessarily implies that it has not engaged in the process of resolving regulatory ambiguity. Moreover, HUD's regulations do not even mention the issues of judicial review and equitable or affirmative

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[16]See, e.g., 42 U.S.C. § 12162(e)(2)(C) (Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*)("Failure to receive reasonable cooperation required by this subparagraph shall not be a defense to a claim of discrimination under this chapter."); 18 U.S.C. § 984(a)(1)(B) (civil forfeiture of fungible property)("[I]t shall not be a defense that the property involved in such an offense has been removed and replaced by identical property"); 7 U.S.C. § 1574 (Federal Seed Act, 7 U.S.C. §§ 1551 *et seq.*) ("The use of a disclaimer, limited warranty, or nonwarranty clause . . . shall not constitute a defense . . . in any proceeding brought under this chapter.").

[17]See, e.g., 7 U.S.C. § 136d(c)(2) (Federal Insecticide, Fungicide, and Rodenticide Act,7 U.S.C. §§ 136-136y)(order of Dept. of Agriculture administrator suspending pesticide registration "shall not be reviewable by a court" unless registrant requests hearing within five days of receiving notice of proposed suspension); 23 U.S.C. § 134(f)(2) (Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, 105 Stat. 1914.)(metropolitan planning organization's failure to consider factors relating to development of surface transportation systems "shall not be reviewable by any court under this title. . ."); 23 U.S.C. § 135(c)(2) (failure of state plan to consider factors relating to development of surface transportation systems "shall not be reviewable by any court under this title. . .").

[18]*See*, Argument at II.A.1, *supra*.

[19]HUD Brief at 36 ("...[T]he plain language of Section 1437d(l)(6) unambiguously authorizes eviction without regard to tenants' knowledge of the drug-related activity of guests or other persons under their control.")

defenses. Consequently, this is not a case where the agency's interpretation is intended to resolve uncertainty over an issue which the agency's regulation directly addresses. Cf., *Auer*, 519 U.S. at 456 (1997)(exemptions from regulation-defined standard within Secretary's delegated authority to define and delimit scope of exemption); *Id.* at 461(controlling weight given to Secretary's interpretation of salary-basis test which is creature of regulation)(citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Finally, as a matter of policy this Court should not reward HUD for failing to legislate, by appropriate means, matters which have been within HUD's sights for years. Since at least the mid-1990's, HUD has been fully aware of the impact of judicial review and affirmative tenant defenses on proposed terminations of public housing tenancies, as those protections were determinative in numerous reported decisions. *See, e.g., Patterson, supra* (United States Housing Act prohibits imposition of strict liability); *Hibbler, supra* (PHAs must consider mitigating factors in public housing drug evictions; trial court properly credited tenant's claims of innocence in defense to eviction action). If one is to assume that these matters were important to HUD, one must also assume that HUD knew very well how to address them. See, Screening and Eviction for Drug Abuse and Other Criminal Activity, Final Rule, 66 Fed. Reg. 28776 (May 24, 2001). To grant controlling weight to HUD's informal interpretations, at this stage, would simply undermine the purposes upon which the APA was founded. *Guernsey*, 514 U.S. at 110 (disapproving of agency's resolution of foreseeable issue through informal interpretation rather than notice and comment rulemaking)(O'Connor, J., dissenting); *Id.* at 109-110 (". . . [The] Secretary advances a view of the regulations that would force us to conclude that she has not fulfilled her statutory duty to promulgate regulations determining the methods by which reasonable Medicare costs are to be allocated.").

b) To accord *Chevron* deference to HUD's interpretations would frustrate the interests which the *Chevron* doctrine is intended to advance.

In requiring deference to federal agency rulemaking, *Chevron* and its progeny serve three related interests: vesting policy making in federal agencies accountable to the President (467 U.S. at 864-865),[20] vesting policy making in agencies whose expertise exceeds that of the judiciary (467 U.S. at 865), and promoting uniformity of results. *See*, *Mead*, 121 S.Ct. at 2175 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting")(declining to extend *Chevron* deference). *See*, *also*, Merill & Hickman, Chevron's Domain, 89 Geo.L.J. 833, 861 (2001).

Deference in these circumstances would fail to serve any of the above interests. In the first place, HUD's rulemaking does not purport to represent a policy choice by HUD. Indeed, the ultimate decisionmaking presented by this case materializes only in the actions of local state-commissioned PHAs in resolving disputes (or not) according to any number of mitigating circumstances. Thus, HUD and petitioner Oakland Housing Authority are not invoking *Chevron* to protect the policy choices of an agency accountable to the President. See, K. Davis & R. Pierce at § 2.5, p. 54 (accountability turns, *inter alia*, on issue of whether President has power to recall head of agency for cause). Consequently, *Chevron*'s goal of political accountability cannot be served. Furthermore, the question of whether indigent persons should have a meaningful right to judicial review of a state agency's decision to terminate essential housing benefits, is not one for which a court is less qualified than the agency to answer. It is not a question that is peculiar to the realm of assisted housing, nor does it require agency expertise in order to reach the

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[20]See, generally, K. Davis & R. Pierce, Admin. Law Treatise, §2.5, at 60 ("[*Chevron*] supports a holding that the basic concept of democracy requires that all government policymaking that does not take place through the legislative process must be subject to Presidential control.")

correct answer. Cf., *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981)(agency's interpretive authority justified in light of Social Security Act's complexity). Finally, by proposing that the various local PHAs should decide, on a case-by-case basis, whether and to what extent to permit tenants to assert the defense of innocence and other mitigating circumstances, HUD necessarily promotes a non-uniform regime. In sum, HUD's interpretations do not serve the interests upon which the *Chevron* doctrine is based, and instead will undermine those interests.

c) HUD's interpretations which purport to prohibit an eviction court from hearing an abuse of discretion challenge to PHA decisionmaking, or from considering a tenant's affirmative and equitable defenses, fail to satisfy the standard for deference under *Skidmore*.

Assuming *Chevron* deference is inapplicable, the next inquiry is whether the interpretations are due any deference under *Skidmore*. As articulated by *Mead*, the degree of deference due under *Skidmore* depends upon a weighing of five factors: (1) the thoroughness of the agency's consideration, (2) the validity of the agency's reasoning; (3) the degree of agency expertise evident in the interpretation; (4) the consistency of the interpretation in light of the agency's earlier and later pronouncements; and (5) all other factors bearing on the persuasiveness of the interpretation. *Mead*, 121 S.Ct. at 2172 (quoting *Skidmore*, *supra*); 121 S.Ct. at 2175 (interpretation has colorable claim to *Skidmore* deference where regulatory scheme highly detailed and agency can bring specialized experience to bear).

HUD's interpretations fail in all five respects. To begin with, HUD's assertions that Congress had abrogated the right to any judicial review of PHA decisionmaking, as well as the tenant's affirmative and equitable defenses, only arose in an adversarial proceeding before the Court of Appeals. Such reasoning cannot constitute an agency's "fair and considered" judgment. *Cf.*, *Auer*, 519 U.S. at 462. The fact that HUD's deliberations have produced

little in the way of certainty, and much in the way of ambiguity, only reinforces the point.

HUD's interpretations also reveal significant lapses in the agency's reasoning. For example, HUD asserts that neither its proposed (1999) nor final (2001) rules preempted state law. That assertion cannot be reconciled with HUD's argument before the Court of Appeals, where HUD announced the abrogation of the right to judicial review of adverse PHA decisionmaking, as well as the nullification of the tenant's affirmative and equitable defenses.

HUD's interpretation of the rationales for § 1437d(*l*)(6) evidences a similar inconsistency. In the preamble to the 1991 final rule, HUD asserted that § 1437d(*l*)(6) permitted liability without regard to actual tenant fault or knowledge of crime. 56 Fed. Reg. at 51567. That assertion, when paired with HUD's view that the PHA has ultimate responsibility for deciding whether to sue, implies necessarily that a completely innocent tenant might nonetheless be evicted, despite having taken reasonable steps to prevent the commission of crime. See, 237 F.3d at 1124 ("HUD conceded at oral argument that there was nothing more Pearlie Rucker could have done to protect herself from eviction, but argued that the statute authorized her eviction nonetheless."). Such a result, in turn, conflicts with HUD's assertions regarding the several purposes underlying § 1437d(*l*)(6). According to HUD, § 1437d(*l*)(6) promotes deterrence by several methods: (1) by coercing tenants, under threat of strict liability evictions, to educate household members and guests of the serious consequences of drug-related criminal activity and to encourage tenants to take "whatever" steps are necessary to protect the security of the housing development (HUD Brief at 35-36); (2) by increasing the PHA's ability to remove drug criminals by reducing the PHA's evidentiary burdens at trial (*Id.*); and (3) by permitting "partial evictions," i.e., removal of only the offending household member from the residence. 56 Fed. Reg. at 51567 ("If a tenant cannot control criminal activity by a household member, the tenant can request that the PHA remove the person from the lease as an authorized unit occupant, and may seek to bar access by that person to the unit."). HUD's suggestion that partial eviction is a workable

remedy cannot be correct. Clearly, no tenant has an incentive to report crime committed by another household member if doing so will only expose the reporting tenant to the risk of eviction. As HUD acknowledges, its interpretations in no way restrain a PHA from proceeding with the eviction of the innocent, reporting tenant. Moreover, the regime suggested by HUD is inherently arbitrary, given that it permits some innocent tenants to be evicted, as a result of strict liability enforcement, and others to stay, as a consequence of partial eviction. Such leniency cannot further the ostensible goal of deterrence, and would instead be far more likely to frustrate it.

Finally, HUD's recognition of the relevance of mitigating circumstances (See, 24 C.F.R. § 966.4(l)(5)(vii)(B)) is undermined by the paired counter-assertions that (1) PHAs may, at their election, refuse to consider these circumstances at all, and (2) no court may review the PHA's decision to ignore such evidence. See, 66 Fed. Reg. 28783 (PHA may forego exercise of discretion altogether)(". . . [C]onferring discretion on PHAs to take action does not require them to take action . . ."); 237 F.3d 1113, 1123, n. 3 (no judicial review of PHA decisionmaking). Clearly, mitigating circumstances are not relevant if the law permits their rejection in every case. No matter how unlikely such an outcome may be, it is nonetheless entirely consistent with HUD's interpretations. Indeed, HUD conceded at oral argument before the Court of Appeals that there was nothing more that Respondent Pearlie Rucker could have done to protect herself from eviction, but argued that the statute nonetheless authorized her eviction. *Id.* at 1124. Assuming mitigating circumstances truly merit HUD's respect, it is remarkable that HUD did not envision a role for them in the forum where factual findings are actually made, and where the question of eviction is ultimately decided. HUD's interpretation precludes the presentation of such evidence to a court of law, and instead leaves the weighing of these circumstances to state-commissioned agencies, with no enforceable standards to guide them, and with all-too-obvious results.

The third inquiry under *Skidmore* is also not met in this case. Whether a tenant should have a meaningful right to judicial review of adverse agency action, or the right to raise affirmative and

equitable defenses to an eviction action, are not questions for which HUD, or any agency, is more qualified than the judiciary to answer. Neither question is peculiar to the realm of assisted housing, and neither requires agency expertise for the correct answer. *Gray Panthers*, *supra*.

The fourth factor under *Skidmore* is just as unavailing. As described above, HUD's denial of preemptive effect irreconcilably conflicts with HUD's assertions regarding the abrogation of judicial review and affirmative and equitable defenses. Furthermore, HUD's unequivocal assertion to the Court of Appeals regarding judicial review, which later appeared in the 2001 preamble, is not consistent with HUD's 1991 preambular discussion, given that the latter did not foreclose the issue, as does the former.

Finally, HUD's position is unpersuasive by any general measure. In addition to the reasons stated previously, *Amici* stress two additional concerns. First, recipients of need-based benefits are, as a consequence of their indigence, among society's most vulnerable citizens. In recognition of this fact, Congress has required that they not suffer arbitrary termination of the benefits that are essential to their survival. Thus, for nearly two decades Congress has required PHAs to use leases that prohibit termination of assistance in the absence of "serious or repeated violation of the terms or conditions of the lease or for other good cause." 42 U.S.C. § 1437d(*l*)(5) (1994 & Supp. V 1999). This protection, known as the good cause doctrine, recognizes that need-based housing assistance is of such critical importance to low-income persons that it should not be terminated in the absence of evidence that the tenant herself is guilty of serious misconduct. *See, e.g., Maxton Hous. Auth. v. McLean*, 328 S.E.2d 290 (N.C. 1985); *Messiah Baptist Hous. Dev. Fund Co. v. Rosser*, 400 N.Y.S.2d 306 (N.Y.City Ct. 1977); *Moundsville Hous. Auth. v. Porter*, 370 S.E.2d 341 (W.Va. 1988). HUD's proposed construction of § 1437d(*l*)(6) obtains precisely the evil that the good cause doctrine was designed to eradicate, as it leads necessarily to the eviction of innocent persons without regard to culpability, and with no right of judicial review to curb agency abuse. See, 237 F.3d 1113 at 1124. Indeed, agency abuse was precisely the problem that led

courts, and later Congress, to develop the good cause requirement in the first place.[21]

Second, to the extent that PHAs expend scarce resources to evict innocent persons, actual crime will go unchecked. While *Amici* can find no fault with a PHA's efforts to rid public housing complexes of actual offenders, there is nothing to be gained by casting innocent and needy persons into the street for crimes that they could have done nothing to prevent.

B. Because HUD's interpretations are entitled to no deference, the construction of § 1437d(*l*)(6) urged by the respondents should control.

Because HUD's interpretations are entitled to no deference, this Court should give controlling weight to the construction of § 1437d(*l*)(6) advanced by the respondents, in light of the overall purpose of the United States Housing Act. According to that construction, Congress has clearly prohibited the termination of public housing assistance for criminal activity that the tenant neither knew of nor had reason to know. Consequently, Congress could not have intended to abrogate the tenant's affirmative and equitable defenses, nor the tenant's right to judicial review of adverse PHA decisionmaking, as these are plainly necessary to protect against erroneous and unwarranted termination of essential housing assistance.

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[21]The good cause standard evolved first as a matter of case law. During the McCarthy Era, a number of PHAs required tenants to sign loyalty oaths as a condition of their continued tenancy. When tenants refused to sign, the PHAs attempted to evict them. A number of courts held that the tenants' refusal was not good cause to evict, because eviction on that ground had no rational relationship to the purposes of public housing. *See, e.g., Hous. Auth. v. Cordova*, 279 P.2d 215 (Cal. App. Dep't Super. Ct. 1955); *Chicago Hous. Auth. v. Blackman*, 122 N.E.2d 522 (Ill. 1954).

Conclusion

For the above reasons, *Amici Curiae* respectfully request that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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